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No. 94-725

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994.

LIABILITY INVESTIGATIVE FUND EFFORT, INC.; LEONARD MORSE, M.D.; JUAN PENHOS, M.D.; WAYNE GLAZIER, M.D.; FRANCIS ROCKETT, M.D.; J. GORDON RICH, M.D.; AND JAMES BOYD, M.D.,

Petitioners,

v.

COMMONWEALTH OF MASSACHUSETTS; LINDA RUTHARDT, COMMISSIONER OF INSURANCE, COMMONWEALTH OF MASSACHUSETTS; AND MASSACHUSETTS MEDICAL PROFESSIONAL INSURANCE ASSOCIATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

COMMONWEALTH'S BRIEF IN OPPOSITION

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Questions Presented

1. Does an insured have a property interest subject to procedural due process protection in expressly provisional medical malpractice insurance rates?

2. May an insured who fails to establish confiscation or other deprivation of property maintain a procedural due process claim premised upon delay in establishing prospective medical malpractice insurance rate increases to recoup deficits?

3. Does a statute that makes prospective rate increases the only method of recouping deficits of a self-supporting medical malpractice insurance joint underwriting association impair the obligations of insurance policies entered prior to its enactment but subsequent to the original statute that provided for recoupment by either assessments or prospective rate increases?

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

COMMONWEALTH'S BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15, the respondents Linda Ruthardt, Commissioner of Insurance for the Commonwealth of Massachusetts ("Commissioner"), and the Commonwealth of Massachusetts (collectively, "Commonwealth") submit this brief in opposition to the petition for writ of certiorari ("Pet.").

Decision Below

The opinion of the Massachusetts Supreme Judicial Court, reproduced at pages A1-A16 of the appendix to the petition ("Pet. App."), is reported at 418 Mass. 436, 636 N.E.2d 1317 (1994).

Jurisdiction

The opinion of the Supreme Judicial Court was entered July 21, 1994. See Pet. App. A1. The petition was filed October 18, 1994, and was received by the Commonwealth on October 18, 1994. The petitioners invoke the Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

Relevant Constitutional and Statute Provisions

The Commonwealth accepts the recitation of constitutional and statutory sections involved as set forth at pages 2-3 of the petition with certain additions:

The preamble to Mass. St. 1975, c. 362, provides:

> Whereas the deferred operation of this act would tend to defeat its purpose, which is, in part, to guarantee the continued availability of medical malpractice insurance . . . . [Preamble]

Mass. St. 1975, c. 362, § 6, provides in pertinent part:

> The purpose of the [MMPIA] shall be to provide medical malpractice insurance on a self-supporting basis. [second par.]

***

Said plan [of operation for the MMPAI] shall also provide that any profit achieved by the association shall be added to the reserves of the association or returned to the policyholders as a dividend. [fourth par.]

***

Any licensed physician or hospital upon proof that the physician or hospital has made a reasonable effort to obtain insurance and has been unable to obtain it shall be entitled to apply to the [MMPAI] for such coverage. [fifth par.]

***

Any deficit sustained by the association in any one year shall be recouped, pursuant to the plan of operation and the rating plan then in effect by an assessment upon the policyholders, or a rate increase applicable prospectively, or both; provided, however, that in no event shall a deficit incurred by the association be charged, directly or indirectly, to any person other than the insured under a policy of medical malpractice insurance; and provided, further, that for purposes of this sentence, when deficits sustained on account of phyisician or hospital malpractice coverage are being recouped, the term "policyholders" shall mean all those licensed physicians or hospitals insured under a policy of medical malpractice insurance, whether obtained through the joint underwriting association or not. [seventh par., as originally

enacted]

The seventh paragraph of Mass. St. 1975, c. 362, § 6, was repealed and replaced by Mass. St. 1980, c. 333, which provided:

> Section 6 of chapter 362 of the acts of 1975 is hereby amended by striking out the seventh paragraph and inserting in place thereof the following paragraph:
>
> Any deficit sustained by the association in any one year shall be recouped, pursuant to the plan of operation and the rating plan then in effect by a rate increase applicble prospectively; provided, however, that in no event shall a deficit incurred by the association be charged, directly or indirectly, to any person other than the insured under a policy of medical malpractice insurance; and provided, further, that for purposes of this sentence, when deficits sustained on account of physician or hospital malpractice coverage are being recouped, the term "policyholders" shall mean all those licensed physicians or hospitals insured under a policy of medical malpractice insurance, whether obtained through the joint underwriting association or not.

Mass. St. 1986, c. 351, § 38, is accurately reproduced at pages A17-A20 of the appendix to the petition.

Statement of the Case

This case arises from the petitioners' attempts to challenge (1) the collection under Mass. St. 1986, c. 351, of premium rates finally established with respect to policies for the 1983 and 1984 rate years, where the initial rates were provisional under the express terms of the policies, and (2) the potential collection under Mass. St. 1975, c. 362, § 6, as amended by Mass. St. 1980, c. 333, of prospective rates in some future rate year to recoup deficits for operations in the 1975-82 years, *if* a deficit is found to exist in administrative proceedings. An accurate statement of the case appears at pages A3-A5 (opinion of the Massachusetts Supreme Judicial Court) of the appendix to the petition. However, the petition does not accurately describe the relevant background in at least six areas. As to those subjects, the Commonwealth also states as follows.

1. In describing the creation of the respondent Massachusetts Medical Professional Insurance Association ("MMPIA"), then named the Medical Malpractice Joint Underwriting Association (Pet. 3), the petitioners fail to note that the Massachusetts Legislature acted "to guarantee the continued availability of medical insurance" in the Commonwealth. St. 1975, c. 362, Preamble. See *Risk Management Foundation of Harvard Medical Institutions v. Commissioner of Insurance*, 407 Mass. 498, 500, 554 N.E.2d 843 (1990) ("*Risk Management*"). Section 6 of the statute established the MMPIA. The MMPIA is authorized to issue medical malpractice insurance policies to physicians and hospitals that have "made a reasonable effort to obtain insurance and [have] been unable to obtain it." *Id.* § 6, fifth par.

2. While the MMPIA was established by statute, the petitioners' implicit (Pet. 3) and later explicit (Pet. 12-13) claim that the policies issued by the MMPIA are obligations of the Commonwealth is wrong. The MMPIA was expressly created to provide insurance "on a self-supporting basis." St. 1975, c. 362, § 6, second par. To that end, the statute establishing the MMPIA authorized it to recoup deficits from policyholders. St. 1975, c. 362, § 6, seventh par. (originally and as amended by St. 1980, c. 333). In keeping with its self-supporting nature, the MMPIA is also authorized to return profits to policyholders. St. 1975, c. 362, § 6, fourth par. The Commonwealth does not financially support or benefit from the policies issued by the MMPIA.

3. The petitioners also erroneously assert that the insurance coverage provided by the MMPIA is "in no real sense insurance" because policyholders are subject to recoupment (Pet. 5). As the Supreme Judicial Court stated, "Insurance, however, involves not just the shifting of risk from insured to insurer, but also risk-sharing among insureds. The fact that the MMPIA will not suffer losses does not deprive the [petitioners] of insurance" (Pet. App. A12 n. 11). The MMPIA is an independent entity, subject to state regulation, similar to a mutual insurance company, whose members receive insurance coverage and accept the possibility of dividends if there is a profit but also of additional charges if a deficit occurs.

4. The petitioners erroneously assert that the action of the Commissioner in authorizing collection of additional premiums in June 1986 was recoupment of a deficit pursuant to St. 1975 c. 362 (Pet. 4). Petitioners omit the fact that the amounts allegedly "recouped" were the result of the usual ratesetting process and reflected the fact that the decision of the

Commissioner setting the premiums for the 1983-84 policy year (which were expressly provisional under the terms of the policies) was reversed on appeal. *Medical Malpractice Joint Underwriting Ass'n of Massachusetts v. Commissioner of Insurance*, 395 Mass. 43, 478 N.E.2d 936 (1985). The Legislature then froze the rates at the levels set in the initial decision. Mass. St. 1985, c. 671; Mass. St. 1986, c. 37. After the Commissioner issued his final rate decision, the Legislature removed the freeze and allowed the MMPIA to collect the difference between the provisional rates and the rates as finally determined, but only over a period of five years. Mass. St. 1986, c. 351, § 38(2), (3).[1]

5. Throughout the petition, petitioners confuse two separate statutes.

a. The Deferred Premium Liability Statute, St. 1986, c. 351, § 38 ("DPL Statute"), addressed the question of how to collect the "total deferred premium liability," defined as the outstanding premiums on 1983, 1984 and 1985 policies whose collection was delayed because the Legislature temporarily froze premiums at an interim level below that finally established by the Commissioner. Mass. St. 1986, c. 351, § 38(1). The DPL Statute provided for deferral of the amounts

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[1] This history, briefly summarized in the Supreme Judicial Court's decision (Pet. App. A4-A5), is set forth in more detail in earlier decisions of the Supreme Judicial Court. See *Massachusetts Medical Society v. Commissioner of Insurance*, 404 Mass. 720, 721, 537 N.E.2d 116 (1989), and *Liability Investigative Fund Effort, Inc. v. Medical Malpractice Joint Underwriting Association of Massachusetts*, 409 Mass. 734, 738, 569 N.E.2d 797 (1991).

due until July 1, 1987 and annual collection of predetermined portions of the total over a five-year period. St. 1986, c. 351, § 38(3). The DPL Statute thus concerned only amounts that were properly due as premiums under St. 1975, c. 362, § 6, *i.e.*, the rates the Commissioner had finally determined to be "adequate, just, actuarially sound and self supporting". The separate DPL rates and "pass-through" adjustments ended with the rate year 1991/92. *See* St. 1986, c. 351, §§ 38(3) and 18.

b. The recoupment provisions of St. 1975, c. 362, § 6, seventh par., as amended by St. 1980, c. 333 ("Recoupment Statute"), address a different problem: the recoupment of a "deficit." Such a deficit may result from rates that, while properly set initially, do not ultimately fully fund actual loss experience, loss related expenses and other obligations to policyholders. The recoupment provisions reflect the legislative intent that the MMPIA be "self-supporting," even if the rates set do not conform to actual experience and operations. St. 1975, c. 362, § 6, second par. In 1987, the MMPIA commenced an administrative proceeding before the Commissioner asking to recoup deficits for the 1975-82 period. That proceeding, which among other issues presents questions concerning the time period over which losses mature and thus deficits can be known to exist, is still pending, and there has been no determination whether any deficits actually exist.[2]

6. In their brief description of this action (Pet. 5-6), petitioners fail to mention that the Supreme Judicial Court had

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[2] Certain preliminary rulings in that proceedings were the subject of an interlocutory appeal to the Supreme Judicial Court. *Risk Management*, 407 Mass. 498.

issued an earlier decision reversing the Superior Court's initial dismissal of the action and remanding the case for an individualized determination whether each of the twenty-three counts of the complaint could be maintained in the Superior Court. *Liability Investigative Fund Effort, Inc. v. Medical Malpractice Joint Underwriting Association of Massachusetts*, 409 Mass. 734, 569 N.E.2d 797 (1991). On remand, the petitioners stipulated to the dismissal of all but four of the twenty-three counts of their complaint. As the Supreme Judicial Court noted (Pet. App. A9, A11 n. 9), petitioners stipulated to dismissal of the counts raising substantive due process and takings challenges.

Reasons for Denying the Writ

"A review on writ of certiorari is not a matter of right but of judicial discretion." Rules of the United States Supreme Court, Rule 10.1. Such a writ is to be granted "only when there are special and important reasons therefor." *Id.* The purpose of certiorari jurisdiction is to permit the Court to select cases of "such gravity and general importance" as to warrant plenary review. *In re Woods*, 143 U.S. 202, 206 (1892).

The petitioners do not claim that the Supreme Judicial Court of Massachusetts "has decided a federal question in a way the conflicts with the decision of another state court of last resort or of a United States court of appeals." Supreme Court Rule 10.1(b). Nor do they assert that the decision has importance beyond its application to the parties. They seem only to contend that the decisions may conflict with decisions of this Court.

For the reasons set forth below, these contentions lack

merit. As the petition does not satisfy the traditional criteria which guide the Court's discretionary review, it should be denied.

I. PETITIONERS' PROCEDURAL DUE PROCESS CLAIMS DO NOT WARRANT REVIEW BY THIS COURT.

In their first question, the petitioners ask the Court to review the Massachusetts Supreme Judicial Court's decision upholding the constitutionality of the DPL Statute and the Recoupment Statute against procedural due process challenge. This question does not warrant review because the due process issue turns predominantly on the peculiar history of Massachusetts medical malpractice ratesetting, which does not present questions of broad importance or conflict with decisions of this Court.

1. The petitioners assert that the due process issue they present is "important" because they "are being heavily burdened in the *present* for transactions which occurred in the *past*" (Pet. 7)(emphasis in original). However, with respect to the DPL Statute, the crux of the matter is that petitioners lack a protected property interest because the Supreme Judicial Court found that rates on which petitioners rely were provisional as a matter of state law.

In order to invoke the protection of the Due Process Clause, the petitioners must have a property interest rising to the level of an entitlement. *E.g.*, *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Such property interests are created and defined "by existing rules or understandings that stem from an independent source such as state law." *Id.* The petitioners apparently assert a right not to

pay premiums at rates higher than the initial premiums. However, "[t]he policies in the record that were issued in [the 1983-85] period all state explicitly that the rates charged in those policies are 'provisional'" (Pet. App. A9) (decision of the Supreme Judicial Court). This fact disposes of petitioners' procedural due process claim as to the DPL Statute. *See Weaver v. Graham*, 450 U.S. 24, 29-30 (1981) ("Evaluating whether a right has vested is important for claims . . . under the Due Process Clause[], which solely protect[s] pre-existing entitlements."); *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 362 (1932)(no denial of due process to require carrier to refund a portion of rates made provisional by statute).

Moreover, even if a protected interest existed, the provisions of the DPL statute delaying and spreading the collection of the difference between the provisional and final premiums over five years are not subject to procedural due process challenge. "[T]he legislative determination provides all the process that is due." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). See *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445-46 (1915).

2. The petitioners also challenge the potential application of the Recoupment Statute after conclusion of the pending administrative proceeding. With respect to this statute, their claim that the due process issue is "important" (Pet. 7) is subject to two responses.

First, to the extent petitioners assert that they should not be burdened for past deficits, they make a substantive due process challenge, and that issue was waived by petitioners' dismissal of the count of their complaint raising that claim (Pet. App.

A9)(opinion of the Supreme Judicial Court). Where the substantive due process claim was voluntarily dismissed in the trial court, the issue has not been properly "specially set up or claimed" within the meaning of 28 U.S.C. 1257(a). It is accordingly not before the Court. *Cf. Beck v. Washington*, 369 U.S. 541, 549-50 (1962)(argument not made in trial court "is not properly before this Court").[3]

Second, petitioners' argument does not accurately reflect the workings of the Recoupment Statute, which only operates prospectively. As amended, the statute permits application of a separate recoupment rate to all policyholders in a future year, regardless of whether the policyholders were even in business in the deficit year. The statute thus does not operate

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[3] Even assuming that petitioners could raise a substantive due process issue, the mere fact that a burden is being imposed on account of past actions does not make a statute arbitrary in violation of due process. See *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733-34 (1984)(not arbitrary to require withdrawing employer to compensate pension plan for benefits vested at time of employer's withdrawal); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19-20 (1976)(not irrational to require mine operators to provide compensation for former employees' injuries arising out of employment even if employment terminated prior to legislation). In this case the purported "burden," the potential recoupment of deficits for the 1975-82 years, simply represents the amounts necessary to assure the continued existence of the MMPIA and thus the availability of medical malpractice insurance in the Commonwealth. The existence of the MMPIA benefits all physicians and hospitals in the Commonwealth and thus they may rationally be required to pay for a deficit. See *Risk Management*, 407 Mass. at 505, 554 N.E.2d at 848.

retrospectively.

3. The petitioners appear to assert that the Supreme Judicial Court's decision conflicts with this Court's decisions in *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935), and *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587 (1926)(Pet. 7, 9). Neither case bears on the matter at hand. Indeed, the petitioners concede that "neither of the[] inadequate rate situtations [in *Alton* and *Smith*] is what confronts the Petitioners here" (Pet. 9).

In *Alton*, the Court applied substantive due process or takings principles to hold the Railroad Retirement Act of 1934 unconstitutional as a deprivation of property. See *Alton*, 295 U.S. at 349 (holding that "[i]t is arbitrary in the last degree" to burden railroads with pensions for those who had left service prior to the legislation and rejecting the argument that "such largess" will promote efficiency or safety as "without support in reason or common sense"). As noted above, petitioners have waived such claims. In any event, even assuming that this aspect of *Alton* "retains vitality," see *R.A. Gray*, 467 U.S. at 733; *Turner Elkhorn*, 428 U.S. at 19, the situtation here, like those in *R.A. Gray* and *Turner Elkhorn*, is clearly distinguishable from that in *Alton*.

Petitioners claim that their settled expectations have been upset (Pet. 9) and focus on the language of *Alton* concerning the imposition for the future "of a burden never contemplated by either party" (Pet. 7 (quoting *Alton*, 295 U.S. at 349)). However, the parties to the insurance contracts plainly contemplated that the petitioners might bear the costs that they now challenge. The statute in effect at the time the MMPIA and insureds entered into the 1975-82 policies specifically

provided that the MMPIA was a "self supporting entity" and established a mechanism or mechanisms for recoupment of deficits from policyholders. St. 1975, c. 362, § 6, second par, seventh par (as originally enacted and as amended). Petitioners thus have no reliance interests of the type recognized in *Alton*. *See Atkins v. Parker*, 472 U.S. 115, 130 (1985) ("All citizens are presumptively charged with knowledge of the law.").[4]

Petitioners' reliance on *Smith* is equally misplaced. In that case, a utility operating under a schedule of confiscatorily low rates had filed a schedule of increased rates which the Commerce Commission refused to act upon. 270 U.S. 589-90. The Court held that "long-continued and unreasonable delay in putting an end to confiscatory rates" deprived the utility of property in violation of due process. *Id.* at 591. Petitioners assert that "there is no meaningful difference between rates which are so low as to be confiscatory, and insurance premiums which are so excessive as to be confiscatory" (Pet. 9). However, petitioners assert a delay-based claim, and there is a great difference between delay that deprives a claimant of property in the meantime (as in *Smith*) and a delay where the claimant holds property (as here). Petitioners had the use of monies until assessment of the separate DPL rates under the DPL statute, and they still have the use of monies pending a determination whether a deficit exists and whether any rate

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[4] With respect to the DPL Statute, of course, the insurance policies themselves provided that the initial 1983-84 and 1984-85 rates which the petitioners claim to have relied on were "provisional."

increases will be ordered under the Recoupment Statute.[5] They have thus suffered no confiscation of property.

4. In any event, even if they could invoke the Due Process Clause, petitioners must establish that delay in an administrative proceeding is "unreasonably prolonged" to establish a violation of due process. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 547 (1985) (9-month delay, of itself, "does not state a claim of constitutional deprivation."). The significance of a delay "cannot be evaluated in a vacuum." *Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 242 (1988). The petitioners have not even specified the delay of which they complain, let alone articulated any ground for thinking that the delay was unreasonable. This fact-intensive issue would require analysis of the Commissioner's ratesetting proceedings and the pending recoupment proceeding. These matters are not of sufficient general importance to warrant review.

II. PETITIONERS' CONTRACTS CLAUSE ARGUMENT DOES NOT MERIT REVIEW BY THIS COURT.

In the portion of their petition devoted to their Contracts Clause question, petitioners do not even address the substance of the Supreme Judicial Court decision, let alone assert that it conflicts with any decisions of this Court. Review by this Court is not warranted because petitioners waived the question of the constitutionality of the DPL Statute, and the Supreme

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[5] Similarly, the petitioners had the use of monies until assessment of the separate DPL rates under the DPL Statute.

Judicial Court's decision accords with decisions of this Court. Even on petitioners' terms, however, review is not warranted because the appeal presents questions of state law that lack broad importance.

1. To the extent petitioners' second question purports to present a challenge to the DPL Statute on Contracts Clause grounds, was waived both by petitioners' failure to argue it in the trial court and by their failure to argue the issue in their principal brief on appeal as required by Rule 16(a)(4) of the Massachusetts Rules of Appellate Procedure (Pet. App. A6 n.4)(opinion of the Supreme Judicial Court). The petitioners thus failed to properly "draw in question" the validity of the DPL Statute on this ground before the State courts. See 28 U.S.C. § 1257(a). In light of this waiver, the issue is not preserved. See *Beck v. Washington*, 369 U.S. at 551-52, 553.[6]

2. Petitioners do not advance any argument directed at the holding of the Supreme Judicial Court that the Recoupment Statute, St. 1980, c. 333, does not operate retroactively (Pet. App. A7-A8). That statute continued the provision for recoupment by prospective rate increases originally enacted by St. 1975, c. 362, § 6, seventh par., and it only operates prospectively. Under the statute, recoupment liability is shared by all "policyholders" in the future rate year, and it is

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[6] In any event, the initial premium rates on which the petitioners rely in challenging the DPL Statute were provisional under the express terms of the policies for 1983-85. Revision of such rates thus does not impair the contracts. See *Weaver*, 450 U.S. at 29-30; *Great Northern Ry.*, 287 U.S. at 362.

independent of any prior contractual relationship between a physician and the MMPIA. The Legislature "opted for a method of collection which would look to the future, rather than the potentially more burdensome method of examining past activity for liability purposes." *Risk Management*, 407 Mass. at 504 n.6, 554 N.E.2d at 847 n.6.

The Contract Clause, however, "applies only to laws with retrospective, not prospective, effect." *Local Div. 589, Amalgamated Transit Union v. Comm. of Mass.*, 666 F.2d 618, 637 (1st Cir. 1981)(citing *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827)), *cert. denied*, 457 U.S. 1117 (1982). By the statute's terms, any recoupment will affect rates only in a future year and will apply to policyholders and policies in that future year. Since the Recoupment Statute was effective before any annual insurance policy to which a recoupment obligation may attach was made, the Contract Clause is not implicated. See *Watson v. Employers Liability Assur. Corp.*, 348 U.S. 66, 70 (1954) (impairment of contract claim is "wholly devoid of merit" where "the direct action provisions [of the statute] became effective before the insurance contract was made").

3. The Supreme Judicial Court's decision made it unnecessary to reach the issue whether the policies from 1975 to 1980 contain, as petitioners contend, a term that purportedly prohibits recoupment by prospective rate increases and limits the MMPIA to recoupment by means of assessments. The Supreme Judicial Court did state that "[i]t cannot be the case that by entering into its insurance policies the MMPIA restricted the Legislature's ability to authorize any future deficit recoupment method *not specified in the policies*" (Pet. App. A7)(emphsis added). Contrary to the petitioners' assertion

(Pet. 10-11), however, there is no such agreement in the policies, which reserve the right to recoup by assessment but are silent with respect to recoupment by prospective rate increases. No language in the pre-1981/82 policies purports to limit the means by which the MMPIA may recoup any deficit.[7] The contracts thus do not contain the provision on which plaintiffs' Contracts Clause argument depends. *Cf. Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 246 n. 18 (1978) (challenged law "nullified an express term of the pension plan"). Moreover, the law in effect at the time the policies were entered specifically allowed recoupment "by a rate increase applicable prospectively." St. 1975, c. 362, § 6, seventh par. In light of the specific provisions of the statute, petitioners cannot show any contractual right to avoid recoupment by prospective rate increase in future years. *Cf. General Motors v. Romein*, U.S. , 112 S. Ct. 1105, 1110 (1992) (petitioners "have not shown that the alleged right to rely on past payment periods as closed was part of Michigan law at the time of the original contract").

4. Even if the insurance policies contained the term on which the petitioners puport to rely, the Contracts Clause issue does not warrant review because the petitioners' only claim of "substantial" impairment rests on speculation. Petitioners

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[7] The policies' silence concerning recoupment by increases in prospective rates is not surprising. Recoupment by prospective rates by definition does not affect premium rates for the policies for a deficit year but only for the rate year(s) in which recoupment is sought. Thus, a reference to recoupment by assessment does not imply any prohibition of recoupment from future policyholders by rates payable in future years.

claim only one harm from the alleged impairment: that as policyholders in a future year when a prospective rate increase to pay for a deficit is imposed they may be members of a smaller pool than if the deficit had been recouped by an assessment on the policyholders in the deficit year (Pet. 14-15). However, as the Supreme Judicial Court pointed out (Pet. App. A12), there is no evidence in the record concerning any change in the size of the pool of policyholders over time, and this claim is purely speculative.

Moreover, in determining the extent of any impairment, a primary consideration is "whether the industry the complaining party has entered has been regulated in the past." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983); *see Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 37-38 (1940).[8] In this case, not only was medical malpractice insurance the subject of extensive regulation under St. 1975, c. 362,[9] but the law at the time petitioners entered the contracts at issue specifically allowed the form of recoupment they now protest. *Id.*, § 6, seventh par.

5. Finally, if there were a substantial impairment, review is not warranted because of the clear public benefit of the

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[8] As noted at page 6, above, the petitioners are simply wrong in asserting that the Commonwealth is self interested. The Commonwealth was not a party to the contracts and has no obligations under them.

[9] Prior to enactment of Mass. G.L. c. 175A, § 5A, by St. 1975, c. 362, § 4, medical malpractice insurance rates were regulated under existing provisions of Mass. G.L. c. 175A.

statute. The Legislature may exercise its police power for the general good of the public even if it affects contracts previously entered. *Energy Reserves Group*, 459 U.S. at 411-12. If the MMPIA is to continue to smooth the operation of the medical care marketplace, then there has to be a way to recoup deficits; otherwise, it eventually would be unable to continue to function in the face of a deficit. The Legislature choose to impose potential recoupment liability on all doctor or hospital "policyholders," whether or not insured by the MMPIA, as a condition of licensure. That determination was a broad exercise of the police power to impose a "generally applicable rule of conduct" on all doctors and hospitals in the Commonwealth, and it did not simply readjust the rights of the contracting parties. *See Exxon Corp. v. Eagerton*, 462 U.S. 176, 192 (1983). Rather, the Legislature removed the potential (and annually increasing) burden of recoupment by assessments from past MMPIA insureds and continued (or, as the petitioners contend, substituted) a recoupment obligation on all policyholders in a future year. This amendment eliminated the practical and administrative burdens of determining and obtaining assessments based on past insurance policies. Those who pay recoupment liability will do so in the context of actual ongoing medical practices. The statute thus appropriately furthers the important goals of ensuring the availablity of medical malpractice insurance and of medical services. In so acting, the Legislature clearly sought to remedy "a broad and general social or economic problem." *Energy Resources Group*, 459 U.S. at 412.

Conclusion

For the reasons stated above, the petition for a writ of certiorari should be denied.

LINDA RUTHARDT, AS COMMISSIONER OF INSURANCE, COMMONWEALTH OF MASSACHUSETTS, AND THE COMMONWEALTH OF MASSACHUSETTS

Respectfully submitted,

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